IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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Decisions Below

The orders of the United States Court of Appeals denying petitioners' motion for reargument containing a suggestion for rehearing *en banc* were entered on February 1, 1978, and are reproduced in the appendix to the petition for certiorari (1a-2a). The decision of the Court of Appeals is reported at 568 F. 2d 998 (1977), and is reproduced in the appendix to the petition for certiorari (3a-32a). The decision of the District Court, which was affirmed by the

Court of Appeals, is unreported and is reproduced in the appendix to the petition for certiorari (32a-36a). The decision of the Court of Appeals of the State of New York, captioned *People* v. *Lemmons,* is reported at 40 N Y 2d 505, 354 N.E. 2d 836 (1976), and is reproduced in the appendix to the petition (37a-53a).

Jurisdiction

A petition for certiorari was filed on April 28, 1978, within ninety days of the entry of judgment of the Court of Appeals denying the petition for rehearing with a suggestion for rehearing *en banc* on February 1, 1978. Certiorari was granted by the Court on October 2, 1978. The Court's jurisdiction rests on 62 Stats. 928, 28 U.S.C. § 1254(1).

Questions Presented

1. Whether New York Penal Law § 265.15(3) may be collaterally attacked as unconstitutional on its face or as applied to the facts of respondents' case, when the New York Court of Appeals declined to consider these same claims because respondents' failure to object to an incomplete jury instruction failed to preserve them for appellate review?

2. Whether, if the Court below was correct in its conclusion that the facial constitutionality of the statute was implicitly affirmed by the New York Court of Appeals, thereby entitling respondents to an automatic appeal of that ruling to this Court pursuant to 28 U.S.C. § 1257(2), respondents' waiver of their right to take such an appeal bars federal habeas corpus review.

3. Whether the decision below, which struck down New York Penal Law § 265.15(3) as facially unconstitutional al-

though the statute had been upheld by the Court of Appeals of the State of New York, should be affirmed, in light of the well-established principle that a court should restrain from formulating a rule of constitutional law broader than required by the facts of the case, and in light of the standards laid down by this Court in prior decisions upholding the constitutionality of such presumptions.

Statute Involved

New York Penal Law § 265.15(3):

> "The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstance:
>
> (a) . . . . if such weapon, instrument or appliance is found upon the person of one of the occupants therein;
>
> (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or
>
> (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same."

Statement

A. The Arrest

Early in the morning of March 29, 1973, while en route from Detroit to New York City* in an automobile belonging to respondent Lemmons, the respondents and a sixteen year old girl** stopped at the home of respondent Lemmons' sister (Tr. 62) in Caledonia, New York for the purpose of exchanging vehicles with Lemmons' brother Robert (Tr. 19). After transferring some unidentified articles from the luggage compartment of their own car to that of the second car (Tr. 72-73), respondents and Jane Doe continued on their way to New York City, only to be stopped by the State Police at approximately 1:00 p.m. that afternoon for speeding on the New York State Thruway (Tr. 345).

Upon the request of New York State Police Officer Emsing, the driver, respondent Lemmons, produced a temporary New York registration certificate and Michigan driver's license (Tr. 165-166). A radio check indicated Lemmons to be a fugitive from Michigan on a weapons charge (A. 54***). A second police officer, one Trooper Askew, then returned to the vehicle, arrested Lemmons and placed him in a patrol car (Tr. 185-186).

At this point, Trooper Askew returned to the vehicle Lemmons had been driving. As Askew looked through the front window on the passenger side, he observed the butt of a handgun protruding from an open handbag resting on

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* While there is no direct evidence in the trial record that respondents began their journey in Detroit with New York City as an intended destination, respondents Hardrick and Allen made this representation to the jury at summation (Tr. 654). Page numbers preceded by "Tr." refer to the State Trial Transcript.

** This passenger was later adjudicated a youthful offender and will hereinafter be referred to as Jane Doe.

*** Page numbers preceded by "A" refer to the Joint Appendix herein.

the floor between the front seat and the door of the car (Tr. 187-188). Neither the handgun nor the bag had been visible the prior times the officers had approached the vehicle (Tr. 179-186). Askew opened the door and seized a .45 automatic pistol, beneath which he found a .38 caliber revolver (Tr. 191). The pistol was found to be fully loaded with conventional ammunition and the revolver with modified or "dum dum" bullets (Tr. 191, 337). The remaining three occupants were then arrested. The automobile was taken to the state police barracks where it was thoroughly searched. As the police were unable to locate the key to the trunk, they forced it open, discovering therein a loaded machine gun and more than a pound of heroin (Tr. 373-374).* Respondents were thereafter indicted for criminal possession of a dangerous drug in the first degree, unlawful possession of a loaded machine gun and unlawful possession of a loaded handgun (two counts).

B. The Trial

At the trial the prosecution relied upon statutory presumptions to establish respondents' joint constructive possession of the handguns, the machine gun and the heroin. Respondents and Jane Doe offered little evidence to rebut New York Penal Law § 265.15(3), which sets forth the statutory presumption applicable to the possession of a loaded firearm or other dangerous weapons, although they elicited some significant evidence** from prosecution wit-

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* The propriety of the search and seizure was sustained on appeal and never challenged on habeas corpus review. Indeed, respondents were foreclosed by this Court's decision in *Stone* v. *Powell*, 428 U.S. 465 (1976) from raising such a claim. Thus, it is the law of the case that the handguns were in plain view of the arresting officer. The decision denying the motion to suppress is set forth in full in the Appendix herein (A. 53).

** At summation, counsel for respondents placed great emphasis upon the fact that the car had been recently borrowed and

(footnote continued on following page)

nesses to rebut the presumption that they were in constructive possession of the machine gun and heroin.

At the close of the prosecution's case, all of the respondents and Jane Doe moved to have indictments dismissed for failure to prove a *prima facie* case (A. 12-17). These motions were denied by the court.

At the close of the case, the jury was instructed that it might rely upon the statutory presumptions* to find respondents guilty of possession of the firearms and the heroin (A. 22-23). However, the judge did not charge the jury that § 265.15(3)(a) provides that the presumption does not apply when a handgun is found on the person of one of the occupants of the car. Respondents did not object to the charge as given. Nor did they offer any proposed instruction relating to the "on the person" exception set forth in the statute, although they had just argued that very point the day before.**

The jury acquitted the respondents and Jane Doe of the first two counts of the indictment, but found them guilty of both counts of unlawful possession of a loaded handgun. At sentencing on June 28, 1974, respondents were sentenced to a maximum term of seven years on each of the two counts, to run concurrently. Jane Doe was adjudicated a youthful offender and given five years probation.

(footnote continued from preceding page)

the absence of the trunk key in a successful effort to rebut the evidentiary presumptions applicable to the contraband locked in the rear luggage compartment.

* The statutory presumption regarding the constructive possession of drugs found in New York Penal Law § 220.25 is not at issue herein.

** The court invited exceptions to the charge three times. There was also a lengthy colloquy covering other aspects of the charge. Nevertheless, the respondents did not even hint that the court was in error in failing to charge the "on the person" exception.

C. The State Court Appeals

Respondents' convictions were affirmed (3-2) by the Appellate Division, Third Department, 44 A D 2d 243 (1975). The majority affirmed without opinion. The dissenters agreed that the seizure of the guns was valid on a "plain view" theory but concluded that the presumption in § 265.15(3) was inapplicable to petitioners, as the handguns were concealed "upon the person" of Jane Doe, and thus the exception contained in § 265.15(3)(a) applied.*

The New York Court of Appeals affirmed the conviction. *People* v. *Lemmons,* 40 N Y 2d 505, 354 N.E. 2d 836 (1976) (Pet. 37a-53a). Although the court discussed respondents' claim that the presumption was inapplicable to the facts of their case, it explicitly stated in both the majority and concurring opinions that it was unable to decide this issue because of respondents' failure to object to the incomplete instruction.

D. Opinion of the United States District Court for the Southern District of New York

On April 19, 1977, the United States District Court for the Southern District of New York (Owen, J.) granted respondents habeas corpus relief. Although Judge Owen did not decide whether § 265.15(3) was unconstitutional on its face, he applied the test set forth in *Leary* v. *United States,* 395 U.S. 6 (1969) to the facts of the case and found that respondents' possession of the weapons could not reasonably be inferred from the presence of the handguns in Jane Doe's open purse. He then concluded that as a matter of state law, the trial judge was in error in denying the respondents' motions to dismiss at the conclusion of the State's case.

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* The inconsistency between these two findings is obvious. The guns could not logically be in plain view while simultaneously be concealed upon Jane Doe's person.

E. Opinion of the United States Court of Appeals for the Second Circuit

Before reaching the substance of respondents' constitutional claim, the majority of the panel of the court below considered and rejected the State's procedural arguments. The court disposed of the State's argument that respondents failed to exhaust their "facial unconstitutionality" claim, raised for the first time in the United States District Court, by deciding that the "as applied" claim respondents raised in state court was sufficiently related to their federal constitutional claim to satisfy the exhaustion requirement.

The court below also dismissed the State's argument that respondents had waived their right to challenge the constitutionality of the presumption upon federal habeas corpus review because their failure to object to the trial court's charge, insofar as it omitted a recitation of the "on the person" exception, and, indeed, their failure to urge in the state appellate courts either that the jury had been charged incorrectly or that their convictions had been obtained in violation of their federal constitutional rights, prevented those tribunals from reaching the merits of their federal constitutional claims.

After thus concluding the respondents' claim that the statute was facially unconstitutional was properly before it, the court below declared the statute unconstitutional on the ground it could not find any rational basis to support the presumption.

F. Motion for Reargument with a Suggestion for Rehearing *En Banc*

As the panel of the court below ruled that the issue of the presumption's facial unconstitutionality had been raised by respondents and implicitly rejected by the New York Court of Appeals, the petitioners urged, among other arguments presented in their motion for reconsideration, that respondents had thus waived their right to federal review by foregoing automatic appeal to this Court pursuant to 28 U.S.C. § 1257(2). Petitioners' motions for reargument with a suggestion for rehearing *en banc* were denied on February 1, 1978.

Summary of Argument

Respondents brought the instant habeas corpus proceeding to challenge the constitutionality of a state evidentiary presumption, both on its face and as it was applied to the facts of their case. Respondents' failure to object at the appropriate stage in the state court proceedings precluded the state appellate courts from considering their claim that the presumption was improperly applied to the facts of their case. Moreover, at no stage in the state proceedings did they attack the statute on federal constitutional grounds. Under this Court's procedural forfeiture doctrine, recently articulated in *Wainwright* v. *Sykes*, 433 U.S. 572 (1977), respondents are now barred from seeking habeas corpus relief.

Assuming *arguendo* that the court below was correct in concluding that the New York Court of Appeals implicitly considered and rejected respondents' federal constitutional claims, respondents had the right to take an automatic appeal to this Court under 28 U.S.C. § 1257(2). Rather than take such appeal, which would have resulted in a final federal disposition of their constitutional claims, respondents applied to the United States District Court for habeas corpus relief. Respondents' waiver of their right to appeal to this Court therefore precludes them, again under the *Sykes* rule, from seeking collateral relief in the lower federal courts.

If the court below was correct in reaching the merits of respondents' federal constitutional claims, it should not have considered the facial constitutionality of the statute, but should have restricted itself to an "as applied" adjudication. Moreover, having improperly reached the issue

of the statute's facial constitutionality, the court below erroneously concluded that the presumption did not comport with due process. In reaching this conclusion, the court below improperly substituted its own common sense and experience for that of the New York State Legislature, misapplied prior decisions of this Court relating to statutory presumptions, and disregarded the New York courts' own principled application of the presumption.

ARGUMENT

POINT I

The New York Court of Appeals explicitly held that respondents' failure to timely object to the incomplete jury charge precluded consideration of their claim that the presumption contained in Penal Law § 265.15(3) was inapplicable to the facts of their case. Therefore, having failed to object to the allegedly unconstitutional charge at the appropriate stage in the state proceedings or indeed to attack the statute itself on any ground at any point in these proceedings, respondents are now barred from collaterally attacking their convictions on federal habeas corpus review.

A. The Doctrine of *Wainwright* v. *Sykes* Applies to the Facts of this Case

In several recent cases, *Estelle* v. *Williams,* 425 U.S. 501 (1975); *Francis* v. *Henderson,* 425 U.S. 536 (1975) and *Wainwright* v. *Sykes,* 433 U.S. 72 (1977) (textual references hereinafter *"Sykes"*), this Court has sharply modified, if not reversed, the rule expressed in *Fay* v. *Noia,* 372 U.S. 391 (1963) which determined the effect of state procedural forfeiture on habeas corpus review. This Court had held in *Fay, supra,* that a failure to observe state timely objection rules was not a bar to habeas corpus review of underlying federal claims, absent a knowing waiver or deliberate bypass of state procedure. The principle now governing the effect of state procedural defaults

is that "absent a showing of cause for the non-compliance and some showing of actual prejudice resulting from the alleged violation", *Sykes, supra,* 433 U.S. at 84, a prisoner who has failed to make timely objection to a constitutional deprivation in state court is barred from attacking his conviction on that ground on habeas corpus review.

A review of the state court proceedings in the instant case with this principle in mind must lead this Court to conclude that respondents' failure to timely object to the incomplete jury charge, as well as their failure to argue or even allege, at any stage of the state court proceedings that their convictions were obtained in violation of their rights under the United States Constitution, present an insuperable bar to consideration of these claims upon federal habeas corpus review.

B. Respondents' State Court Claims

The record clearly shows that the entire thrust of the claim respondents pressed in state court is that Penal Law § 265.15(3) should not have been applied to them because the guns were in Jane Doe's purse and thus upon her person within the meaning of one of the exceptions set forth in the statute.*

1. The Motion to Dismiss the Indictment

Respondents first articulated this claim at the close of the People's case, when they moved for a dismissal of the indictments against them on the ground that the People had not stated a *prima facie* case.** Specifically, respond-

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* The pertinent exception, Penal Law § 265.15(3)(a), provides that the presumption shall not apply to other occupants of an automobile "if such weapon, instrument or appliance is found upon the person of one of the occupants therein."

** Upon information and belief, no written motion or memorandum of law was submitted to the trial court at that time. The entire colloquy within which these arguments were made is contained in the joint appendix herein (A. 12-22).

ent Lemmons argued that the presumption should not be applied to him because he was already under arrest and in the patrol car when the weapons were discovered. He also argued that as the weapons were thereafter found in Jane Doe's purse, possession could not be imputed to him. Respondents Allen and Hardrick argued simply that the "on the person" exception precluded the presumption's use against them. None of the respondents premised their motions on either state or federal constitutional grounds.

The trial court, expressing doubt as to whether the "on the person" exception could be triggered by presence of the firearms in a passenger's purse, denied the motions and the respondents went forward with their case.

2. The Incomplete Charge

At the close of the case, the judge charged the jury on the presumption, but did not advise it of the exception contained in subsection (a) (A. 22-32). Respondents failed to object,* although New York Criminal Procedure Law § 470.05 provides that such an objection must be made in order to preserve the issue for appellate review. The New York courts have consistently applied this section to jury instruction. *People* v. *Schwartzman,* 24 N Y 2d 241, 247 N.E. 2d 642, *cert. denied,* 396 U.S. 846 (1969); *People* v. *Simons,* 22 N Y 2d 533, 240 N.E. 2d 22 (1968), *cert. denied,* 393 U.S. 1107 (1969); *People* v. *Adams,* 21 N Y 2d 397, 235 N.E. 2d 214 (1968).

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* The respondents vigorously pressed their "on the person" argument the day before the charge was given and again soon after the verdict was returned. Even *Fay* v. *Noia, supra,* required some showing that a habeas petitioner did not deliberately bypass state procedural requirements. It is submitted that counsel had this objection uppermost in their minds at the time the instructions were given and deliberately failed to make it. While one can only speculate as to respondents' strategy, it may have been that counsel, believing albeit erroneously, that their earlier motion had preserved the issues for appellate review, hoped that if a conviction were to result, it would be so infirm as to be clear grounds for reversal. The New York Court of Appeals did not, of course, agree.

3. The Motion to Set Aside the Verdict

After the jury returned with guilty verdicts on the two handguns counts, the respondents moved to set aside the verdicts on the same grounds upon which they moved to dismiss the indictment, i.e. that as a matter of state law, they were entitled to the benefit of the "on the person" exception. They presented this same argument to the Appellate Division, which affirmed without opinion, and finally to the Court of Appeals.

4. The New York Court of Appeals' Opinions

The New York Court of Appeals was unable to reach the merits of respondents' "as applied" claim, because it found that their omission to make a timely exception to the incomplete jury charge failed to preserve this issue for appellate review.

Judge Jasen writing for the majority, clearly stated the basis for that court's affirmance as follows:

> ". . . [T]he trial court never charged the jury with respect to the 'on the person exception.' Nevertheless the defense did not except to the absence of this language in the court's charge. As a result, what we view as a jury question was never presented to the jury and for the reasons stated *we cannot conclude in this case that as a matter of law the presumption was inapplicable.*" 40 N Y 2d at 512. (Emphasis supplied).

In a separate opinion, Judge Jones explicitly restated the narrow basis for the court's affirmance as follows:

> "But no reference was made in the charge to the statutory provision that the presumption would not apply 'if such weapon . . . is found upon the person of one of the occupants.' No exception was taken to this charge and no request was made that the charge be accurately completed. *Thus, the jury was never advised of the exception and the case was submitted to*

and resolved by it on the basis of a blanket presumption which had become the law of the case. Accordingly, in the procedural posture in which these verdicts were returned there can only be an affirmance." 40 N Y 2d at 513. (Emphasis supplied).

C. Respondents' Federal Claims

1. The Opinion of the District Court

Thereafter, respondents commenced the instant habeas corpus proceeding. In paragraph four of their petition to the District Court (A. 5-9), respondents raised the "facially unconstitutional" argument for the first time. In paragraph five they alleged further that the incomplete jury charge deprived them of due process "in that it failed to charge a necessary element of the crime; namely, that the conviction could only be had if the jury found that the guns in question were not upon Jane Doe's person." (A. 9)

The District Court, relying upon *Fay* v. *Noia,* 372 U.S. 391 (1963) and the Second Circuit's decision in *Kibbe* v. *Henderson,* 534 F. 2d 493 (2d Cir. 1976), *rev. sub nom. Henderson* v. *Kibbe,* 431 U.S. 145 (1977), noted that there was not a deliberate bypass of state procedure. However, the court reasoned that it was not necessary to reach the "charge issue" as the presumption was, as a matter of law, inapplicable to the facts of the case, and consequently the trial judge's denial of the respondents' motion to dismiss the indictment was incorrect.•

• The District Court, in placing complete reliance upon *People* v. *Pugash,* 15 N Y 2d 65, 204 N.E. 2d 176 (1964), *cert. denied,* 380 U.S. 936, *app. dism.* 382 U.S. 20 (1965) did so in direct conflict with the New York Court of Appeals' own understanding of its holding in *Pugash* and its relevance to the case at bar. While the District Court held that *Pugash* mandated dismissal by the trial court, the New York Court of Appeals concluded that *Pugash* was not controlling, and that the applicability of the "on the person" exception was a question properly left to the jury. As the District Court was bound by the state court's interpretation of its own statute, *Garner* v. *Louisiana,* 368 U.S. 157, 166 (1971), its decision should have been reversed on that ground alone.

2. The Decision of the Court of Appeals

The District Court opinion was issued on April 17, 1977. On May 16, 1977, this Court reversed the Court of Appeals' decision in *Henderson* v. *Kibbe,* 431 U.S. 145 (1977) and on June 23, 1977, it decided *Wainwright* v. *Sykes, supra.* Notwithstanding the principles announced by this Court in these two significant decisions, and despite the explicit statements by the New York Court of Appeals, the court below dismissed the State's "procedural forfeiture" argument on the ground that respondents had consistently argued their federal constitutional claims at the state trial and appellate levels and thus there was no procedural forfeiture. As support for this conclusion, the court noted in the margin an excerpt of a point from one of respondents' state briefs. This excerpt is actually a condensation of respondents' argument in the state courts, and does not reflect the true nature of their claims. Examination of the entire point (A. 33, 39, 45), however, reveals that respondents' state court "as applied" claim was (1) predicated solely upon state law grounds• and (2) entirely

• Not only is respondents' "as applied" argument contained solely within a point heading which states "The Evidence was Insufficient to Support a Conviction of Lemmons, Hardrick and Allen," but, with the exception of a fleeting reference to the federal standard articulated in *Leary* v. *United States,* 395 U.S. 6 (1969), the argument placed complete reliance upon New York cases. It is thus apparent that respondents never articulated a federal constitutional claim in state court. One authority has stated in this regard that:

> ". . . [I]f the claim is made that a state statute is 'unconstitutional' or that it denies 'constitutional rights', it will be assumed that reference is being made to the state constitution and rights thereunder rather than the federal constitution. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67-68." R. STERN and E. GRESSMAN, SUPREME COURT PRACTICE 212 (5th ed. 1978).

Moreover, in *Gates* v. *Henderson,* 568 F. 2d 830 (2d Cir. 1977) (*en banc*), the court below denied habeas relief to a prisoner who

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derived from their argument that as the guns were on Jane Doe's person as a matter of state law, the presumption was inapplicable to them.

The court below not only recast and mischaracterized respondents' state court arguments in an effort to "cure" their obvious procedural forfeiture, it also evaded application of the *Sykes* doctrine by incorrectly concluding that respondents' failure to make a timely objection did not prevent their claim from being fully considered by the New York Court of Appeals.

However, five judges of the New York Court of Appeals explicitly stated that they were *unable* to reach the merits of respondents' "as applied" claim because of the incomplete charge.* Thus, this is clearly not a case in which a state court considered the merits of a prisoner's claim notwithstanding his waiver, e.g. *Lefkowitz* v. *Newsome,* 420 U.S. 283 (1975), but rather one in which the state appellate court was precluded from considering the merits because of the waiver, and so stated in its decision, e.g. *Francis* v. *Henderson, supra.*

Finally, this Court has attached even greater importance to a failure to object to an infirm jury instruction than to other state procedural waivers, recognizing that a correct charge might have resulted in a different verdict. Justice Rehnquist, who wrote for the majority of this Court in *Sykes,* recognized this precise point in his footnote in

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objected to the taking of his palm prints on fifth and sixth amendment grounds rather than fourth amendment grounds although the fourth amendment claim was raised in the New York Court of Appeals.

* As the court was unable to reach the "as applied" claim because the presumption was not fully charged, that court most certainly could not have reached the "facial" claim as this claim was never argued or briefed to any state court.

Mullany v. *Wilbur,* 421 U.S. 684, 704 (1975), in which he stated:

> "While *Fay* v. *Noia,* 372 U.S. 391 (1963), holds that a failure to appeal through the state-court system from a constitutionally infirm judgment of conviction does not bar subsequent relief in federal habeas corpus, failure to object to a proposed instruction should stand on a different footing. It is one thing to fail to utilize the appeal process to cure a defect which already infers on a judgment of conviction, *but it is quite another to forego making an objection or exception which might prevent the error from ever occurring.* Cf. *Davis* v. *United States,* 411 U.S. 233 . . ." (Emphasis supplied).

This principle was reaffirmed by Chief Justice Burger in his concurring opinion in *Henderson* v. *Kibbe, supra,* where he stated succinctly that:

> ". . . [T]he federal court was precluded from granting respondent's petition for collateral relief under 28 U.S.C. § 2254 because he failed to object to the jury instructions at the time they were given. This was precisely why the New York Court of Appeals refused to consider respondent's belated claim . . .
>
> "Thus, by failing to object to the jury charge, respondent injected into the trial process the very type of error which the objection requirement was designed to avoid. Federal courts may not overlook such failure on collateral attack." 431 U.S. at 157-158 (1977).

Thus, it is eminently clear that the court below was precluded from considering respondents' constitutional claim after the *Sykes* doctrine had been so firmly established by this Court.

POINT II

If the court below correctly concluded that the New York Court of Appeals by affirming respondents' convictions, implicitly upheld the constitutionality of the statute challenged herein, the respondents were entitled to automatic review of that decision by appeal to this Court under 28 U.S.C. § 1257(2). Respondents' failure to take that appeal constitutes a waiver sufficient to bar habeas corpus review.

A. If Respondents Had Taken Direct Appeals to the United States Supreme Court, They Necessarily Would Have Received a Final Determination of Their Federal Constitutional Claims

If the court below is correct in its analysis that despite respondents' failure to object to the incomplete jury charge, the New York Court of Appeals implicitly upheld the constitutionality of New York Penal Law § 265.15(3), respondents were therefore entitled to automatic review of that decision by appeal to this Court under 28 U.S.C. § 1257(2). Unlike the Supreme Court's certiorari jurisdiction which is discretionary, this Court would have "had no discretion to refuse adjudication of the case on its merits . . ." *Hicks* v. *Miranda,* 432 U.S. 322, 344 (1975). Any disposition of the appeal, including either summary affirmance or summary dismissal for "want of a substantial federal question", would have been an adjudication by this Court on the merits of the very claim presented in this habeas corpus proceeding.

B. If Respondents Had Taken Their Direct Appeals to this Court, They Would Now be Barred From Raising Their Present Claims in a Habeas Corpus Proceeding

If respondents had taken the appeal to which they were entitled, and had received the "actual adjudication" of the

constitutional claims they now present, to which they were also entitled, they would be barred from relitigating the same claims in a habeas corpus proceeding. Congress has so provided in 28 U.S.C. § 2244(c) which "embodies a recognition that if [the Supreme] Court has 'actually adjudicated' a claim on direct appeal or certiorari, a state prisoner has had the federal determination to which he is entitled." *Neil* v. *Biggers,* 409 U.S. 188, 191 (1972). This statute was "[c]onsistent with the overall scheme of allowing the petitioner to obtain one federal determination" of his federal constitutional claims. *United States ex rel. Radich* v. *Criminal Court of the City of New York,* 459 F. 2d 745, 749 (2d Cir. 1972), *cert. denied sub nom. Ross* v. *Radich,* 409 U.S. 1115 (1973). Thus, there can be no dispute that this case would not be before this Court today had respondents taken their appeals of right from the decision of the New York Court of Appeals in 1976.

C. Having Deliberately Waived Their Right To Take Such Appeals, Respondents Should be Barred From Seeking Habeas Corpus Relief

Last term, in *Wainwright* v. *Sykes, supra,* this Court enunciated a new test to determine when a state prisoner's failure to raise an issue of federal constitutional law at his state trial would bar him from pursuing that claim in a subsequent federal habeas corpus proceeding. See *Point I, ante.*

The test enunciated in *Sykes* should apply to respondents' failure to obtain a final federal determination of their present claim from this Court on direct appeal as well as their failure to comply with state procedural requirements. In fact, the rationale supporting this Court's holding in *Sykes* applies with equal or greater force to this situation even though (indeed, because) it is a federal determination which respondents waived. One of the major reasons for this Court's broad waiver test in *Sykes* was the interest in "finality in criminal litigation." *Wainwright* v. *Sykes,*

supra, 433 U.S. at 88. That interest bears with equivalent strength upon any procedure available to a prisoner in his state litigation, including most certainly his direct appeal to this Court. Had respondents taken that appeal from the 1976 decision by the New York Court of Appeals, their criminal litigation, begun in 1973, would have come to a complete and final conclusion long ago, rather than continuing into 1979.

The State's interest in "finality of criminal litigation" in this case, however, extends far beyond respondents themselves. The constitutional challenge presented herein directly threatens the conviction of every prisoner in New York to whom § 265.15(3) and similar statutes were applied. If this statute is invalidated, a serious possibility exists that such a decision would apply retroactively. See *Hankerson* v. *North Carolina,* 432 U.S. 233 (1977); *Ivan V.* v. *City of New York,* 407 U.S. 203 (1972). In that event, the delay in the determination of the constitutional issues raised herein—due *solely* to respondents' failure to take their appeals of right to this Court—would force New York to release many prisoneres convicted of firearms possession pursuant to the presumption and to retry many others. These consequences are not trivial, and consequences of this scope are not unique to this case. To the contrary, the invalidation of any criminal statute subject to automatic review under 28 U.S.C. § 1257(2) is likely to have widespread impact extending beyond a single case.

Thus it is apparent that the interest in "finality of criminal litigation" is merged with some of the same considerations of comity and federalism which supported *Wainwright* v. *Sykes, supra.* These considerations require federal courts to minimize their interference with state proceedings and state operations, *Rizzo* v. *Goode,* 423 U.S. 362, 380 (1976); *O'Shea* v. *Littleton,* 414 U.S. 488, 501-02 (1974); *Younger* v. *Harris,* 401 U.S. 37, 44 (1971), and support a rule in this case which would minimize federal interference by restricting belated habeas relief.

Another major justification for the expanded waiver holding—the interest in "making the state trial on the merits the 'main event' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing"—was identified by this Court in *Sykes, supra,* 433 U.S. at 90. This interest, too, is at heart one of federalism and applies with great force to this situation, since respondents could have made their trial not merely the main event but indeed the "only appearance" by taking a direct appeal to the Supreme Court and obtaining a final federal determination of all their federal constitutional claims in the direct appeal process.

Another federal interest, that of avoiding forum-shopping by state prisoners between the Supreme Court and the lower federal courts, dictates a holding that a prisoner who foregoes direct appeal is barred from habeas corpus relief. One can easily imagine a state prisoner or his counsel carefully weighing the Supreme Court's most recent pronouncements in the areas analogous to the prisoner's federal claim, comparing those decisions to the holdings of the district and circuit where he is confined (or was convicted), and choosing the court most likely to look upon his claim with favor. Virtually no other litigant anywhere in the federal system except States and foreign dignitaries [See Article III, Sec. 2; 28 U.S.C. § 1251(b)] has that privilege. Certainly forum-shopping of this nature should not be encouraged since it promotes inconsistency and disharmony within the federal judiciary, and tends to defeat the perception of the federal courts as a unified national system.

Finally, there is a strong federal interest present in judicial economy. Direct appeal to the Supreme Court disposes of a federal claim in one federal court in one hearing. Habeas corpus review involves dispositions by the Federal District Court, the Court of Appeals and probably by the Supreme Court at least in considering whether a writ of certiorari should be granted. Plenary Supreme

Court review, if granted, requires a fourth round of papers and decisions. Surely this interest alone requires that a prisoner avail himself of one-step federal review or abandon his right to three or four-step review.

POINT III

The court below improperly considered the facial constitutionality of the statutory presumption. Moreover, having inappropriately reached this issue, it misapplied the standards applicable to such state evidentiary presumptions to incorrectly conclude that the statute was facially unconstitutional.

A. In striking the statute down as facially unconstitutional, the majority below departed from the well-established principle that a court should refrain from formulating a rule of law broader than required by the facts before it.

Judge Timbers' concurring opinion below contains a cogent statement of the restraints which preclude a court from formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *United States* v. *Raines*, 362 U.S. 17 (1960), citing *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioner of Emigration*, 113 U.S. 33, 39 (1885). See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-612 (1973); *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347 (1936); *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 60, 129 N.E. 2d 202 (1920) (CARDOZO, J.) As Judge Timbers correctly cautioned, such broad review is justified primarily in first amendment adjudications on the ground that a statute's very existence might serve to deter protected activity. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970). However, this "chilling effect" rationale has no application to a law such as the one before us, which does not implicate first

amendment interests, and which furthermore regulates only trial procedure and not primary conduct. Indeed, for these reasons, facial review is rarely encountered in opinions involving the criminal process. 83 HARV. L. REV. at 852 n. 33.

An additional restraint, which Judge Timbers observed to derive "from [both] a desire to avoid intrusion into matters properly the province of the state courts [and] unnecessary constitutional showdowns", 568 F. 2d at 1011, should compel reversal of decisions such as the one below which not only set aside a criminal conviction affirmed by the highest state court but precludes retrial as well.

Only recently, in *Patterson* v. *New York*, 432 U.S. 197 (1977), this Court stressed the primacy of the states in the administration of criminal justice, and the respect to be accorded their statutes:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion. . . .'" 432 U.S. at 201 (citations omitted).

In harmony with the doctrine articulated in *Patterson, supra*, this Court has dismissed appeals from two decisions of the New York Court of Appeals upholding the constitutionality of criminal presumptions. *People* v. *Terra*, 303 N.Y. 332, 102 N.E. 2d 576, *app. dism. for want of a substantial federal question*, 342 U.S. 938 (1952)*; *People* v. *Kirk-*

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* The presumption upheld in *Terra*, now contained in New York Penal Law § 265.15(1), is virtually identical to the one at

(footnote continued on following page)

patrick, 32 N Y 2d 17, 295 N.E. 2d 753, *app. dism. for want of a substantial federal question*, 414 U.S. 948 (1973).

In *People* v. *Kirkpatrick, supra,* this Court was asked to review a New York Court of Appeals decision explicitly upholding the constitutionality of New York Penal Law § 235.10(1), which provides that a person who sells obscene material in the course of his business is presumed to do so with knowledge of both its contents and its obscene character.

Thus *Kirkpatrick* involved both a first amendment issue and a criminal statutory presumption. This Court's dismissal of that appeal, when viewed conjointly with its decision in *Patterson, supra,* provides additional support for Judge Timbers' position, and must be regarded as a clear signal to the lower federal courts that while they may be free to apply a facial analysis to statutes regulating first amendment activity, greater deference must be accorded to state evidentiary presumptions.

In rejoinder to the arguments raised by Judge Timbers, Judge Mansfield, writing for the majority below, listed several of this Court's cases on presumptions as purported examples of "on the face" review in this area, 568 F. 2d at 1010 n. 21, to support this mode of adjudication in situations in which first amendment values are not implicated. However, the judge's reasoning is misplaced. Not only does his view disregard the comity and federalism interests ever present in collateral attacks on state court convictions, considerations clearly not present in appeals to this Court from federal convictions, but in the leading deci-

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(footnote continued from preceding page)

issue herein. Although the court below attempted to distinguish *Terra* from the instant case by claiming that New York law defines occupants of a room more narrowly than occupants of a car, neither the statutes themselves nor any judicial construction thereof make such a distinction.

sion of *Leary* v. *United States,* 395 U.S. 6, 29 (1969), this Court explicitly stated: "We consider whether *in the circumstances of this case,* the application of the presumption . . . denied petitioner due process of law." (Emphasis supplied)

But even apart from dubious reliance upon claimed precedent, Judge Mansfield's reasons for striking the presumption facially are untenable. In his view, the multiplicity of factual contexts in which the statutory presumption might occur militates against an *ad hoc* approach to its validity. In truth, however, the presumption's fact orientation and dependence on many possible variables, actually favor the "as applied" method, as a court can scarcely anticipate the multiplicity of circumstances that may determine the balance reached in individual circumstances. While Judge Mansfield's discussion of this point contains an implicit concession that there are indeed many sets of circumstances which would justify the application of the presumption, he nevertheless rejects the "as applied" approach as "fruitless", since "the validity of the presumption would be upheld only in instances where the evidence would, independent of the statute, support an inference of possession," 568 F. 2d at 1010. Assuming *arguendo* that this assertion is correct, it ill behooves the federal judiciary to strike down a state legislative enactment on the ground that it is superfluous.

Moreover, Judge Mansfield's rationale that the "as applied" method of analysis would result in a "wholesale conversion of state law issues into due process questions" by "every prisoner to whom this presumption had been applied" appears to be derived more from a concern that these petitioners will crowd the dockets of the lower federal courts than by a fear that the "as applied" approach will embroil the court in an evaluation of "the nature and quality of the evidence required to uphold a conviction under state law. . . ." 568 F. 2d at 1010.

In any event, this fear is misplaced. While it is axiomatic that a federal habeas corpus court may not sit as an appellate court to review the sufficiency of the evidence in support of a conviction unless the conviction is so devoid of evidentiary support as to be a violation of due process, *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Terry* v. *Henderson,* 462 F. 2d 1125, 1131 (2d Cir. 1972), the necessity for meeting this very stringent standard of review will preclude almost all prisoners to whom the presumption has been applied from attacking their convictions on this ground.

B. Even if facial analysis is appropriate here, the challenged presumption satisfies the appropriate standard of constitutionality and should be upheld.

1. A state evidentiary presumption should be adjudged by the "more-likely-than-not" standard of constitutionality rather than the "reasonable doubt" standard.

The proper test for the constitutionality of a presumption has been most definitively set forth by this Court in *Leary* v. *United States, supra.* There, after reviewing its previous decisions as to the constitutionality of presumptions, this Court concluded:

> ". . . [A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." *Id.* 395 U.S. at 36 (Emphasis supplied, footnote omitted).

Using that standard, the *Leary* Court invalidated the presumption set forth in 21 U.S.C. § 176a that possession

of marijuana "shall be deemed sufficient evidence" that the marijuana was illegally imported and that the defendant had knowledge of the fact of illegal importation. The Court relied upon a wide range of factual and statistical information in support of its conclusion and felt this information did not support the necessary determination that "at least a majority of marijuana possessors have learned of the foreign origin of their marijuana. . . ." 395 U.S. at 52.

In applying the "more likely than not" standard noted above, the *Leary* Court observed that it "need not reach the question whether a criminal presumption . . . must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." 395 U.S. at 36, n. 64. In *Turner* v. *United States,* 396 U.S. 398 (1970), the Court again noted the question, *id.* at 416, but did not decide it because the statutes in question relating to heroin and cocaine possession would either meet both tests and thus survive, *ibid.*, or meet neither test and thus fail in any event, *id.* at 422-24.

In *Barnes* v. *United States,* 412 U.S. 837 (1973), the Court once again noted the unanswered question of the applicability of the "reasonable doubt" standard, *id.* at 842-43, but held that the common law presumption there at issue, that of "guilty knowledge . . . from the fact of unexplained possession of stolen goods", *id.* at 843, would meet the stricter test as well as the applicable "more-likely-than-not" test. *Id.* at 846. Significantly, however, the Court explained what the "reasonable doubt" standard would be if applicable. It applied the "rational connection" test of *Tot* v. *United States,* 319 U.S. 463 (1943), to the question of the presumption and stated that the presumption would be upheld if a rational juror could find beyond a reasonable doubt, based upon "common sense and experience", *Barnes, supra* at 845, that a rational connection existed between the proven fact and the presumed fact. Viewed in this light, at least one commentator has concluded

that the *Barnes* "reasonable doubt" test is less stringent than the *Leary* "more-likely-than-not" standard. See Rose, *The Automobile Presumption In The New York Narcotics Law*, 42 FORD. L. REV. 761, 766-67 (1973-74).

Whatever the form of the "reasonable doubt" test, it is clear that this Court has never applied it as the proper test for any presumption. On the other hand, in *United States* v. *Gainey*, 380 U.S. 63 (1965), this Court upheld a presumption which permitted the jury to infer guilt of the crime of carrying on a distilling business from presence at an illegal still, using only the "rational connection" test of *Tot* v. *United States, supra*. *United States* v. *Gainey, supra* at 66. Thus, *Gainey* did not present the "both or neither" situation which permitted the Court to avoid choosing a single test in *Leary, Turner* and *Barnes*, and in *Gainey*, this Court did choose a single test—the "more-likely-than-not" standard as set forth above in *Leary* v. *United States*.

Thus, in determining the constitutionality of Penal Law § 265.15(3), this Court should apply only the "more-likely-than-not" standard. Since it has never applied the "reasonable doubt" standard to federal law presumptions, it would be unfair, and contrary to controlling principles of comity and federalism for this Court to apply an arguably stricter standard to a state law presumption such as the one at issue herein. See *Patterson* v. *New York, supra*.

State law presumptions are and should be entitled to a more lenient standard of review from the federal courts than federal law presumptions, and this Court should accord more deference to a state presumption than it might to a federal enactment. Indeed, in *Patterson* v. *New York, supra*, this Court stressed the primacy of the states in the administration of criminal justice, and the respect to be accorded state criminal laws, particularly those regulating

> "procedures under which its laws are carried out, including the burden of producing evidence and the

> burden of persuasion. . . ." 432 U.S. at 201 (citations omitted).

This Court should not seek to apply a strict test of constitutionality which would unduly impair the State's freedom to structure its criminal justice system to meet the demands upon it, but if anything should strain to uphold an important and rational state evidentiary presumption such as the one in issue here. The "more-likely-than-not" test enunciated in *Leary* v. *United States, supra*, is the proper test of constitutionality in this case.

2. The history of Penal Law § 265.15(3) clearly shows that the statute has a sound basis in common sense and experience.

Cautioning that the judgment of the legislature in determining the rationality of the relationship between the proved fact and the presumed fact should be accorded great weight by the courts,* provided this judgment is based upon common sense or reliable empirical data, *United States* v. *Gainey, supra*, 380 U.S. at 63; *Leary* v. *United States, supra*, 395 U.S. at 39, this Court has upheld the constitutionality of statutory presumptions based upon "folklore", *United States* v. *Gainey, supra*, 380 U.S. at 67; "common sense", *Leary* v. *United States, supra*, 395 U.S. at 46; "common experience", *Barnes* v. *United States, supra*, 412 U.S. at 844 and even "the popular media",

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* While the decision of the court below acknowledge the "deference ordinarily due to legislative judgments regarding the connection between the proved fact and the presumed fact", 568 F. 2d at 1008, it nevertheless found that the "state's efforts to justify this statute to be without merit". *Id.* As the district court explicitly limited its decision to the facts of this case, deliberately declining to reach the question of the statute's facial constitutionality, the State was not forewarned that this was to be an issue on appeal. Thus, the State had neither cause nor opportunity to fully advise the court of the statute's legislative background.

Turner v. *United States, supra,* 396 U.S. at 417. In each of these cases, the Court did not intensively analyze the legislative history* of the statute to determine what connection, if any, Congress had found between the proved fact and the presumed fact. Instead, it imputed to Congress the capacity to amass the stuff of actual experience and cull conclusions from it. *Gainey, supra,* 380 U.S. at 67.**

Although the court below indicated a preference for reliable empirical data to support the rationality of the connection between the proved fact and the presumed fact, a state legislature is simply not required to conduct a factual study or statistical survey to justify every evidentiary presumption it enacts.*** The strictures of this approach in the present context are self-evident. As the report of one New York State legislative committee stated:

> "Statistics concerning the use of unlicensed handguns have an inherent limitation: the number of reported crimes involving handguns by no means indicates the number of such weapons actually involved. Clearly one unlicensed handgun can be responsible for a series of related or even unrelated crimes through its passage from criminal hand to criminal hand. Obviously the

* In *Turner* v. *United States, supra,* this Court did employ a wide range of statistical data derived from reports of various agencies. However, it did not indicate that this information had been considered by Congress at the time it enacted the statute.

** The only clear evidence of Congressional intent found by this Court in *Gainey* is that "Congress enacted these provisions because of 'the practical impossibility of proving . . . actual participation in the alleged activities except by inference drawn from [the defendant's] presence when the alleged acts were committed . . .'" *Gainey, supra,* 380 U.S. at 65. The court below, however found that prosecutorial convenience may not be used to justify enactment of a statutory presumption. 568 F. 2d at 1008.

*** In fact, "legislatures are presumed to have enacted constitutionally even if their source materials are otherwise silent . . ." *McDonald* v. *Board of Elections,* 394 U.S. 802, 809 (1969).

> only statistics available are for those instances where a handgun used in a crime has been seized." REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON CRIME, ITS CAUSES, CONTROL AND EFFECT ON SOCIETY, N.Y. LEG. DOC. No. 81, 38-39 (1968).*

Although little statistical data was or could have been available to the various legislative bodies who studied and enacted the instant presumption into law, the legislative history shows that these bodies relied upon their collective common sense and experience, as well as the experience and informed judgment of the many advisory groups they consulted to conclude that there is a strong likelihood that all passengers in a vehicle containing dangerous weapons such as loaded firearms, explosive devices and other criminal instruments enumerated in Penal Law § 265.15 share possession of that contraband.

a. The 1936 Statute

While the presumption at issue herein was not enacted until 1936, New York State has restricted the right of its citizens to carry dangerous weapons outside their homes and businesses since 1881.** It was not until 1926, however, that various law enforcement agencies and other individuals involved in the criminal justice system expressed their concern with the obvious interplay between dangerous weapons, automobiles and the commission of violent crimes.*** The

* This same report found that in 1965, two years after the statute at issue was amended by the Legislature, more than 6,000 illegal firearms were used in the commission of violent crimes such as murder, robbery and assault in New York State. The following year, almost 10,000 illegal weapons were used to commit such crimes. *Id.* at 43.

** Penal Code § 410, 1881 N.Y. Laws, Chap. 676.

*** Indeed, the special problems associated with the application of many existing law enforcement procedures to the automobile have been long recognized and still exist. See *Pennsylvania* v. *Mimms,* 434 U.S. 106 (1977); *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Carroll* v. *United States,* 267 U.S. 132 (1925).

Crime Commission of the State of New York, created by the New York Legislature in that year to "examine the crime situation in New York State and [to] report to the legislature its findings and recommendations and drafts of bills necessary to carry them out"• found that "the tools of the criminal today are the pistol and the automobile."•• Criticizing the then existing gun control laws as a "relic of the 'horse and buggy days', [which] has no place in these more strenuous automobile times,"••• the Commission proposed a new "Pistol Bill"•••• to combat a suddenly mobile criminal element. In its discussion of this problem, the Commission found that:

> "It is unquestionably true that the pistol is one of the greatest, if not the greatest, menaces to the peace of society today, and that its free use in the commission of crimes of violence has caused more arrests among people, and added more to the horror of crime than any other one thing. It is one reason why crimes of violence are common today and the criminal successful in such crimes, particularly holdups and robberies. Add to this the use of the automobile for quick getaway and you have a complete picture of the terror which is spread among people and of a situation which puzzles the police to detect or prevent and the courts to punish."•••••

The Commission, particularly concerned with the situation described above, and hoping to prevent armed occupants of an automobile from evading prosecution by "simply dropping their guns on the floors of the automobiles",• included in its proposed law a presumption similar to the one at issue herein. REPORT OF THE CRIME COMMISSION, N.Y. LEG. DOC. No. 23, § 1899s, p. 277 (1928).

• 1926 N.Y. Laws, Chap. 460.

•• REPORT OF THE CRIME COMMISSION, N.Y. LEG. DOC. No. 94, 19 (1927).

••• *Id.*

•••• *Id.* at 22.

••••• *Id.* at 18.

While the proposed statute failed of enactment in both 1927 and 1928 when the Commission urged it to the Legislature, it continued to receive vigorous support from those individuals most concerned with crime prevention and enforcement.•• Three successive New York City Police Commissioners, the Law Revision Commission of the State of New York, the New York State Attorney General, the Association of the Bar of the City of New York, the State Association of District Attorneys, the Committee on Criminal Courts, members of the judiciary and the press all urged its enactment.••• Finally, in response to Governor Lehman's anti-crime program, introduced by Special Message to the Legislature in January, 1936,•••• the presumption was enacted into law as Penal Law § 1898-a.•••••

In harmony with this measure and in further response to the Crime Commission Reports of 1927 and 1928, the Legislature enacted other provisions which further regu-

• *Id.* at 22.

•• REPORT OF THE CRIME COMMISSION, N.Y. LEG. DOC. No. 23, 271-278 (1928).

••• REPORT OF THE CRIME COMMISSION, N.Y. LEG. DOC. No. 94, 22 (1927); Public Papers of Governor Herbert H. Lehman—1936, 459 (1940); Bill Jackets for 1936 N.Y. Laws, Chaps. 216 and 390. See also: *People ex rel. DeFeo* v. *Warden*, 136 Misc. 836, 241 N.Y.S. 63 (1930); *People* v. *Russo*, 278 App. Div. 98, 103 N.Y.S. 2d 603, *aff'd.* 303 N.Y. 673, 102 N.E. 2d 834 (1951).

•••• In urging approval of the proposed statute, Governor Lehman stated that "[t]he foregoing proposals represent highly desirable and necessary extensions of the law relating to concealed weapons. They are designed to protect the law-abiding citizen and will not infringe in any way upon the privileges which he has hitherto exercised with respect to small firearms." Public Papers of Governor Herbert H. Lehman—1936, 104-105 (1940).

••••• 1936 N.Y. Laws, Chap. 390.

lated legal possession and transfer of firearms, thereby limiting their circulation within the State, and increased the severity of penalties for illegal possession.*

Legislative reports, Governors' memoranda and Court decisions of the era, which are noted above, all emphasized that the intimate relationship between illegal weapons and violent crime made it unlikely that the presumption would be used to convict individuals uninvolved in criminal activity.

b. The 1963 Amendment

The presumption contained in Penal Law § 1898-a continued as enacted in 1936 until 1963 when the penal statutes dealing with weapons and firearms were completely revised and reorganized. In 1960, the Joint Legislative Committee on Firearms and Ammunition was created by concurrent resolution of the New York State Assembly and Senate, "to undertake a comprehensive examination and study of all laws pertaining or in any way relating to or affecting the sale, possession and regulation of firearms and ammunition and the administration of such laws and to make appropriate recommendations relating thereto."**

During the life of this Committee, it conducted an intensive analysis of the laws of the fifty states, the New York statutes and the judicial constructions thereof.*** An advisory commission, composed of representatives of the New York State Bar Association, the County Judges Association, The Izaak Walton League, the New York State Police, the District Attorneys Association, the New York State Sheriff's Association, the New York State Rifle and Pistol

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* 1931 N.Y. Laws, Chap. 792, § 2; 1933 N.Y. Laws, Chap. 805; 1934 N.Y. Laws, Chap. 376; 1936 N.Y. Laws, Chaps. 53 and 54.

** REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON FIREARMS AND AMMUNITION, N.Y. LEG. DOC. No. 29, 9 (1962).

*** *Id.* at 10-17.

Association and the New York State Conservation Council, worked closely with the Committee in its efforts to revise New York's weapon and firearms statutes. Numerous public hearings were held throughout the State, and a fifty point questionnaire was distributed to each of the sixty-two district attorneys, nearly all criminal court judges in the state, police chiefs and numerous rod and gun clubs.* Both the public hearings and the questionnaire sought to elicit expert opinion on specific proposals to amend, standardize and conform to judicial construction New York's existing firearms statutes.

The Committee's work resulted in a draft study bill which was introduced in the Legislature on behalf of the Committee in 1962.** The draft bill amended § 1898-a to "make the presumption inapplicable to other occupants of [an] automobile if [the] weapon [is] actually found on the persons of one [of the] occupants.*** The Committee explained that this amendment was included in insure "conformity to judicially constructed requirements of reasonableness in [the] relation between [the] presumed fact and [the] proven one".****

After introduction of the study bill in the Legislature, one thousand copies of a modified draft of the original bill together with explanatory notes were distributed to district attorneys, police departments, bar associations and conservation groups. Public hearings were again held throughout the State, and were attended by representatives

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* *Id.* 27-33.

** N.Y.S. Senate Print. 2, intro. 2 (1962); N.Y.S. Assembly Print. 551, intro. 551 (1962).

*** REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON FIREARMS AND AMMUNITION, NEW YORK LEG. DOC. No. 29, 21 (1962). In Table 5 of this report, which was distributed along with the Study Bill, each of the many proposed changes in the statute was described and explained.

**** *Id.*

of those bodies. In addition, the chairman of the Committee appeared at more than a dozen meetings of interested organizations.*

Thereafter, in 1962, a final draft of the bill was introduced in the Senate and Assembly and enacted into law effective July 1, 1963. The presumption was amended to reflect the recommendation of the Commission that the "on the person" exception be included, and was renumbered as Penal Law § 1899.**

In 1961, one year after the creation of the Joint Commission on Firearms and Ammunition, the Legislature created the State Commission on Revision of the Penal Law and Criminal Code to comprehensively revise the New York Penal Law.*** This commission conducted a thorough and exhaustive study of all New York Penal statutes which resulted in the landmark New York Penal Law, effective September 1, 1967.**** In the new Penal Law the presumption was renumbered as § 265.15(3), but otherwise unchanged. See Gilbert, Criminal Code and Penal Law, Commission Staff Notes on the Proposed New York Penal Law at 1C-92 (1969).

The presumption has received extensive legislative commission and committee scrutiny for over forty years. Each study brought to bear the knowledge and experience of legislators, law enforcement officials, prosecutors and members of the judiciary throughout the State in dealing with the ever growing problem of illegal weapon possession. None of these officials, whose commitment to protect the innocent as well as to punish the guilty is unchallengable,

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* Report of the New York State Joint Legislative Committee on Firearms and Ammunition, New York State Leg. Doc. No. 35, 5 (1963).

** 1963 N.Y. Laws, Chap. 136.

*** 1961 N.Y. Laws, Chap. 346.

**** 1965 N.Y. Laws, Chap. 1030.

ever raised any concern that innocent persons would be wrongfully convicted through the use of this presumption. These careful studies offer irrefutable proof that the presumption, far from being either irrational or arbitrary, has an absolutely sound basis in both "common sense and experience", *Barnes* v. *United States, supra,* 412 U.S. at 845, and consequently satisfies any test of constitutionality it might be required to meet.

Significantly, the Model Penal Code contains a presumption closely resembling the one at issue herein, Model Penal Code § 5.06(3) (Prop. off. draft 1962), and virtually identical statutes are in effect in Illinois (Ill. Crim. Code § 24-1(c), eff. Oct. 1, 1977) and Nebraska (Neb. Rev. Stat. § 28-1011.19; 1967 Neb. Laws, Chap. 1969). A similar presumption has been enacted in New Jersey, which does not contain any exceptions (N.J. S.A. § 2A:151-7; 1966 N.J. Laws, Chap. 60). Thus the soundness of the New York Legislature's judgment is buttressed by the judgments of the legislatures of three other states and the prestigious American Law Institute.

3. In the circumstances of this case, possession of a weapon may rationally be inferred from respondents' presence in the automobile.

In *United States* v. *Romano,* 382 U.S. 136 (1975) this Court struck down a federal presumption deeming presence near an illegal still sufficient evidence to sustain a conviction for possession, custody or control of that still. 28 USC § 5601(a) (1)(b) (1970) (since amended). This Court found that while "presence tells us that the defendant was there and very likely played a part in the illicit scheme", 382 US at 141, mere presence, absent further evidence of the defendant's function at the still, is insufficient to establish possession.

While the court below placed great reliance upon *Romano,* that case is easily distinguished from the one at

bar. The *Romano* presumption implicitly equated "possession" with ownership of the still or control of its operation. Although New York Penal Law § 10.00(8) defines the term "possess" as meaning "to have physical possession or otherwise to exercise dominion or control over tangible property", this definition has been restated in cases involving firearms as requiring that the weapon merely be within the immediate control and reach of the accused and where it is available for his unlawful use if he so desires. E.g. *People* v. *Lemmons, supra,* 40 N.Y. 2d at 509-510; *People* v. *LoTurco,* 256 App. Div. 1098, 11 N.Y.S. 2d 644, *aff'd.,* 280 N.Y. 844, 21 N.E. 2d 888 (1939).

The *Romano* decision was clearly correct in concluding that an individual apprehended in the vicinity of an alleged still might not own either the distilling machinery or the real estate upon which it was erected, or control the distilling process itself. However, the instant presumption applies to a much more narrowly defined class of individuals, those individuals apprehended while within the intimate confines of an automobile. In this limited circumstance, an inference of possession of a firearm, as that phrase has been defined by the New York Courts, logically and rationally flows from presence in the vehicle. Indeed, from the facts of the instant case, it would be irrational to conclude otherwise.•

Moreover, in *People* v. *Levya,* 38 N Y 2d 160, 341 NE 2d 546 (1975), wherein the New York Court of Appeals upheld the constitutionality of Penal Law § 220.25(1),•• a presumption involving possession of a controlled substance

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• Certainly the firearms protruding from Jane Doe's handbag were within respondents' reach and available for their use. The actual "ownership" of the guns is irrelevant.

•• This statute provides that presence of narcotics in an automobile "is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found."

otherwise identical to § 265.15(3), that court distinguished the presumption in *Romano* from presumptions flowing from presence in an automobile:

> "Indeed the unique and mobile nature of automobiles and their role in drug traffic also serves to distinguish the case before us from the circumstances found in *United States* v. *Romano* (382 U.S. 136). *Romano* is further distinguishable in that it involved a statute aimed at those who possess or control the manufacturing process rather than a possession of an illegal substance such as drugs (cf. *Leary* v. *United States,* 395 U.S. 6, *supra; Turner* v. *United States,* 396 U.S. 398, *supra*) and in that it involved imputed possession of large stationary equipment rather than of small, easily transferable packages. As the court's cases in this area make clear, each presumption's rationality must be judged within its own context." 38 N Y 2d at 166, n. 2.

The logic of this decision must have impressed the court below, for less than a year after its decision in the instant case, in *Lopez* v. *Curry,* —— F. 2d ——, Dkt. No. 78-2083 (2d Cir. September 15, 1978),• it expressly upheld the constitutionality of Penal Law § 220.25(1), the presumption at issue in *Leyva, supra.* The *Lopez* opinion disregarded *Romano, supra,* relying instead upon *United States* v. *Gainey,* 380 U.S. 63 (1965). In so doing, the court acknowledged that there are indeed circumstances under which an inference of possession may logically flow from simultaneous presence of an individual and contraband in the same automobile.

Although conceding that the presumption in *Lopez* and the instant case were virtually identical, the Second Circuit

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• This case was a habeas corpus proceeding brought by one of *Leyva's* co-defendants, Carmen Garcia.

attempted to reconcile its inconsistent holdings on two grounds, both of which must be rejected. In addition to noting an absence of explicit legislative justification for § 265.15(3),* the court below distinguished the two presumptions by finding that the presence of drugs in an automobile is much more suspicious than the presence of weapons. *Lopez* v. *Curry, supra,* at Slip. op. p. 7, fn. 8. However, since 1881 the New York State Legislature has regarded illegal weapons possession as serious felony offenses.** In so doing, the Legislature has implicitly deemed mere presence of such contraband to be highly suspicious. By concluding otherwise, the court below has arrogated unto itself a value judgment which should best be left to legislative discretion.

As the court below acknowledged in *Lopez,* this Court's decision in *Romano* does not establish a blanket rule that possession may never be inferred from presence. Indeed, the decisions of this Court clearly teach that the rationality of each statutory presumption must be judged within its own context. Considered within its factual context, Penal Law § 265.15(3) must be sustained.

4. The New York Courts have consistently applied the presumption in accord with the requirements of due process.

Although the court below concedes that the statute itself contains "exceptions to the presumption for three situations in which it would be especially anomalous to infer possession", 568 F. 2d at 1007, it expressed particular concern that the presumption could be used to convict a hypo-

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* New York Penal Law § 220.25(1), although clearly modeled upon § 265.15(3), was enacted thirty years later in 1965. The evidence of legislative intent supporting the latter enactment is more closely at hand, and thus easier to document. However, the same rationale supports both presumptions.

** New York Penal Code § 410, 1881 N.Y. Laws, Chap. 676; New York Penal Law §§ 265.01 *et seq.* (*McKinney's* Supp. 1977).

thetical hitchhiker arrested while a passenger in a vehicle containing a concealed Derringer or Barretta.* *Id.* Despite this concern, however, that court was unable to point to a single reported case in which the presumption was applied to a remotely similar set of facts. Indeed, counsel for petitioners has exhaustively searched every reported case applying the presumption since it was enacted in 1936 and has failed to uncover a single case in which a conviction based on such circumstances has been upheld. It is equally unlikely that such cases will occur in the future. The New York Courts are thoroughly familiar with and have conscientiously applied the "more likely than not" standard since it was first articulated by this Court in its decision in *Leary* v. *United States, supra,* e.g. *People* v. *Leyva, supra; People* v. *Kirkpatrick,* 32 N Y 2d 17, 295 N.E. 2d 753, *app. dism. for want of a substantial federal question,* 414 U.S. 948 (1973); *People* v. *McCaleb,* 25 N Y 2d 394, 255 N.E. 2d 136 (1969), just as they consistently applied the "rational connection" test approved by this Court prior to *Leary,* e.g. *People* v. *Russo,* 278 App. Div. 98 (1st Dept. 1951), affd. 303 N.Y. 673, 102 N.E. 2d 834 (1951); *People* v. *Terra,* 303 N.Y. 332, *app. dism.,* 342 U.S. 938 (1952).

Moreover, the New York courts have *always* applied the presumption on a case by case basis, e.g. *People* v. *Garcia,* 41 A D 2d 560, 340 N.Y.S. 2d 35 (2d Dept. 1973); *People* v. *Alston,* 94 Misc. 2d 89, 404 N.Y.S. 2d 277 (1978); *People* v. *Anderson,* 74 Misc. 2d 415, 344 N.Y.S. 2d 15 (1973) and have not hesitated to reverse convictions where an inference that the accused possessed the firearm did not follow rationally from his presence in the vehicle, e.g. *People* v. *Cohen,* 57 A D 2d 790, 394 N.Y.S. 2d 683 (1st Dept. 1977); *People* v. *Scott,* 53 A D 2d 703, 384 N.Y.S. 2d 878 (2d Dept. 1976); *People* v. *Trucchio,* 47 A D 2d 934, 367 N.Y.S. 2d

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* Of course, the instant case did not involve a small concealed weapon but rather two large caliber weapons exposed to plain view.

76 (2d Dept. 1975); *People* v. *Garcia,* 41 A D 2d 560, 340 N.Y.S. 2d 35 (2d Dept. 1973); *People* v. *Law,* 31 A D 2d 554, 294 N.Y.S. 2d 394 (3rd Dept. 1968).

Indeed, it is highly improbable that a New York Court would permit a verdict to stand based on the circumstances invented by the court below. It is interesting to note in this regard, that in 1962 when asked the following question by the Joint Commission on Firearms and Ammunition,

> "Should the presumption of possession arising from the presence of a weapon in an automobile (§ 1898-a) apply to an occupant who is neither the driver nor the owner and who is unaware of the weapon which is kept out of sight in a glove, trunk or other compartment?"

eighty-six percent of the Criminal Court judges responding answered in the negative.•

Finally, the court below not only assumes that a judge in New York would tolerate a conviction based upon the hypothetical situation it has postulated, but the court also assumes, entirely without basis, that a prosecutor would seek to obtain an indictment on those facts alone. To the contrary, both disciplinary rules and ethical considerations governing the conduct of public prosecutors clearly mandate against a district attorney seeking such an indictment.••

• REPORT OF THE JOINT COMMISSION ON FIREARMS AND AMMUNITION, N.Y. LEG. DOC. No. 29, 30-33 (1962). In 1962, the "rational connection" test of *Tot* v. *United States, supra,* was the applicable constitutional test. It can be safely assumed that in view of the more stringent "more-likely-than-not" test applicable today, the negative vote would be unanimous.

•• New York Judiciary Law, Code of Professional Responsibility, Disciplinary Rule DR7-103 (McKinney 1975) provides that:

> "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he

(footnote continued on following page)

5. The statute compares favorably with federal statutory presumptions upheld as constitutional by this Court.

The federal statutory presumptions found to be constitutional by this Court in *Gainey, Leary, Barnes* and *Turner,* impose a far heavier burden upon the accused to come forward with evidence in rebuttal than the presumption at issue herein. Those presumptions decree that the proved fact, standing alone, is deemed to be sufficient evidence to authorize conviction unless the defendant provides a satisfactory explanation to the jury.

The New York statute is, on its face, far more permissive than the federal presumptions upheld by this Court. While Penal Law § 265.15(3) permits a jury to be charged that the proved fact (presence) is evidence of the presumed fact (possession), the presumption does not require the jury to infer one from the other, nor does it require it to convict upon proof of presence alone, even if the defendant fails to produce any evidence in rebuttal. *People* v. *Leyva, supra.*

The permissive nature of the presumption is reflected in the instructions to the jury in the instant case:

> ". . . [U]pon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed

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(footnote continued from preceding page)

> knows or it is obvious that the charges are not supported by probable cause."

Ethical Consideration 7-13 promulgated thereunder advises that:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute . . ."

by each of the defendants who occupied the automobile at the time when such instruments were found. (A25)

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"The presumption or presumptions which I discussed . . . need not be rebutted by affirmative proof but may be rebutted by any evidence or lack of evidence in the case." (A32)

Indeed, the verdicts in this case, acquitting the respondents of possession of the contraband in the trunk and convicting them of possession of the contraband in the handbag* clearly demonstrates a jury's reluctance to convict on the presumption alone.

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* The handbag, which concededly had been brought on the journey by the sixteen year old co-defendant, was open and positioned on the floor of the car at the time Officer Askew peered inside, although neither the handbag nor the firearms had been visible to either officer a few minutes earlier. The handguns were fully loaded, heavy, large caliber weapons. Jane Doe clearly made no effort to conceal the weapons from her three male companions, who had easy access to them.

Moreover, Jane Doe's counsel strongly urged in summation (A. 18-21) that had the firearms been Jane Doe's exclusive property, she would have had both sufficient time and cause to close the bag prior to Askew's second approach. However, if the guns had been hastily tossed into the bag by respondents, she would have been too flustered and excited to remember to secure them from view. He also belabored what was no doubt obvious to the jury, to wit, that it was highly improbable that his client could either have used these "cannons" effectively or comfortably carried them in her purse.

In contrast, Mr. Torraca, counsel for respondents Allen and Hardrick, virtually conceded that the handguns belonged to his clients who, supposedly fearful of the violence in New York City, brought along these guns for protection:

"Sometimes people do other things. For example, if you were living under their times and conditions and you traveled from a big city, Detroit, to a bigger city, New York City, it is not unusual for people to carry guns, small arms to protect themselves, is it? There are places in New York City policemen fear to go." (A. 21).

CONCLUSION

The order and judgment of the courts below should be reversed, New York Penal Law § 265.15(3) should be declared constitutional, and respondents should be denied habeas corpus relief.

Dated: New Nork, New York
November 28, 1978

Respectfully submitted,

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